

2002-D034-7

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AMERICAN BAR ASSOCIATION

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2002-2003

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April 22, 2003

Ms. Amy Williams
Defense Acquisition Regulations Council
OUSD(AT&L) DPAP(DAR), IMD 3C132
3062 Defense Pentagon
Washington, D.C. 20301-3062

Re: Acquisition of Domestic Fish, Shellfish, and Seafood
Products: DFARS Case 2002-D034; 68 Fed. Reg. 7441

Dear Ms. Williams:

On behalf of the Section of Public Contract Law of the American Bar Association ("the Section"), I am submitting comments on the above-referenced matter. The Section consists of attorneys and associated professionals in private practice, industry, and Government service. The Section's governing Council and substantive committees contain members representing these three segments to ensure that all points of view are considered. In this manner, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.

The Section is authorized to submit comments on acquisition regulations under special authority granted by the Association's Board of Governors. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.

The above-referenced interim rule amends the Defense Federal Acquisition Regulation Supplement ("DFARS") to implement Section 8136 of the Defense Appropriations Act for Fiscal Year 2003, which requires the Department of Defense

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("DoD") to purchase only "domestic fish, shellfish, and seafood." 68 Fed. Reg. 7442. As the interim rule explains, "[t]he objective of the rule is to prohibit DoD acquisition of foreign fish, shellfish, and seafood, even if processed or manufactured in the United States." *Id.* This domestic preference, which applies to contracts and subcontracts for the procurement of commercial items, is expected to "have a beneficial impact on domestic suppliers of fish, shellfish, and seafood." *Id.*

The interim rule makes 10 U.S.C. § 2533a(f), the exception to the domestic source requirements for food processed or manufactured in the United States, inapplicable to fish, shellfish, and seafood products. Rather, such items must be acquired in accordance with DFARS 225.7002-1(a). *See* 68 Fed. Reg. 7442 (reflecting new DFARS 225.7002-2(j)). Therefore, pursuant to the interim rule, fish, shellfish, and seafood products may not be acquired by DoD unless they "have been grown, reprocessed, reused, or produced in the United States." DFARS 225.7002-1(a).

Despite its broad sweep, the interim rule does not provide a definition or other guidance for determining which items qualify as "domestic" fish, shellfish, and seafood products and thus are deemed to have been grown, reprocessed, reused, or produced in the United States. Nor is there a discussion in the interim rule whether domestic fish, shellfish, and seafood would include those caught by US-flag or US-owned vessels, or whether the domestic restriction is intended to focus on the place where the fish, shellfish, and seafood may be caught (*e.g.*, within the three-mile limit of the United States).

Finally, the interim rule does not define the intended geographic limit of "United States" in which the fish, shellfish, and seafood must be manufactured or processed to qualify as domestic. *See* DFARS 225.003 and DFARS 225.7001 (not defining "United States"). *Compare* FAR 25.003 (defining United States to include "the 50 States and the District of Columbia, U.S. territories and possessions, Puerto Rico, the Northern Mariana Islands, and any other place subject to U.S. jurisdiction") *with* DFARS 252.225-7012(b) (referring to products from "the United States, its possessions, or Puerto Rico"). *See also* DFARS 252.225-7021 (defining United States, for purposes of the "Trade Agreements" clause, to mean "the United States, its possessions, Puerto Rico, and any other place subject to its jurisdiction . . .").

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The Section believes that the DFARS must provide a clear definition for "domestic" so that purveyors of fish, shellfish, and seafood to the DoD are aware of their obligations. Accordingly, the Section recommends that the final rule include a definition of "domestic" to provide guidance to the suppliers of these products.

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,

A handwritten signature in cursive script that reads "Mary Ellen Coster Williams".

Mary Ellen Coster Williams
Chair, Section of Public Contract Law

cc: Hubert J. Bell, Jr.
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2002-0034-8

April 3, 2003

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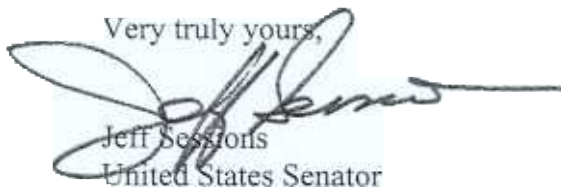
Dear Ms. Williams:

I am writing in support of Secretary of Defense Donald Rumsfeld's position that the seafood our military consumes needs to be domestic.

Without question, all goods that our military uses needs to originate from domestic sources. Food, specifically seafood, should adhere to this standard as well. Currently, an ongoing DoD Case, DFARS Case 2002-0034, addresses this issue. I believe that the requirement for the acquisition of domestic fish, shellfish, and seafood for our service men and women is very important. This is an important issue not only for our domestic seafood industry, but for the United States military as well. Our soldiers deserve the best possible food, and with our nation producing some of the best seafood in the world, we need to ensure the best troops in the world are fed with the best food we can provide.

I thank you in advance for your time and look forward to hearing from you on the final outcome of this case.

Very truly yours,



Jeff Sessions
United States Senator

JS:jwd